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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1256

ROBERT DULAINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

ROBERT DULAINE,
2019 N. Berendo St.
Los Angeles, California 90027
NO 6-0685
Propria Persona.

WESTERN PRINTING COMPANY, WHITTIER—OSBORN 8-1782

Subject Index

	Page
Jurisdiction	3
Statutes and Rules involved	3
Opinion Below	4
Facts in the Case	4
Questions Presented	25
Reasons presented for granting the writ	18

Index to Appendices

Appendix A.	Statutes and rules, Federal laws and procedure involved in Administrative claims	1
Appendix B.	Opinion of the United States Court of Appeals for the Ninth Circuit	3
Appendix C.	Opinion of the Honorable Irving Hill, Judge of the United States District Court for the Central District of California	8
Appendix D.	Original Malpractice Claim and Letters from Veterans Administration proving Appeal is still pending . . . final determination has not been made	11

Authorities Cited

Cases

Page

Nathan Carl Schwartz v. United States of America civ. A. No. 23801 13

Hungerford v. United States, 307 F. 99 (1962) 25, 26, 28

Statutes

Federal Tort Claims Act

28 U.S.C.A. 1346(b) 26

28 U.S.C.A. 2401(b) 2, 3, 9, 24, 26

28 U.S.C.A. 2674 26

28 U.S.C.A. 2680(h) 28

United States Code, Title 28, 2401(b) 18

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Robert Dulaine and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a decision of that court which affirmed the decision of the United States District Court of the Central District of California granting

a summary judgment to the United States of America by applying the statute of limitations and barring petitioners suit for Malpractice and negligence. Suit was filed under Tort Claims Act, 28 U.S.C. 1346(b).

The statute of limitations under the Federal Tort Claims Act (28 U.S.C. 2401(b)) is quoted as follows . . .

2401. Time for commencing action against United States

(b) a tort claim against the United States shall be forever barred *unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail of notice of final denial of the claim by the agency to which it was presented.* As amended Sept. 8, 1959, Pub.L. 86-238, 1(3), 72 Stat. 472; July 18, 1966, Pub.L. 89-506, 7, 80 Stat. 307.

Also listed under 2401 . . .

2401. Time for commencing action against United States

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence,* whichever is later, or unless if it is a claim not exceeding $1000, *it is presented in writing to the appropriate Fed-*

*Enacted in Chapter 92—Public Law 55, 81st Congress, 1st Session, approved April 25, 1949.

eral Agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later.* If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, *suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.* As amended April 25, 1949, c.92,. 1, 63 Stat. 62.

(The $1,000 limit was increased to $2,500 and in 1966 the limit was removed)

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254 (1), U.S. Codes.

The opinion of the Court of Appeals was rendered Jan. 12, 1967.

STATUTES AND RULES INVOLVED

The Statutes and rules involved are: The Federal Tort Claims Act . . . The Statute of Limitations (28 U.S.C. 2401(b) and the rules as to the filing of an Administrative Claim with the Agency invloved . . . which acts as a bar to the Statute of Limitations. These rules and laws are set out in Appendix A. and made a part hereof.

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*Enacted in Chapter 92—Public Law 55, 81st Congress, 1st Session, approved April 25, 1949.

OPINION BELOW

The opinion of the United States Court of Appeals is contained in Appendix B. A copy is attached and made a part hereof.

The opinion of the Honorable Irving Hill, Judge of the United States District Court for the Central District of California is set forth in Appendix C, and made a part hereof.

FACTS IN THE CASE

The appellant, and petitioner, and plaintiff below, was severly wounded with a thru and thru gun shot wound at Iwo Jima during World War II. He was hospitalized for 361 days from Feb. 19, 1945 to Feb. 15, 1946 . . . when he was discharged from the U.S. Marine Corps . . . as a direct result of the combat wounds. He received no treatments, X-rays, or examinations by the Veterans Administration in 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954 or 1955. Even though petitioner was discharged for the effects of a bullet through the body, with tremendous internal damage, numerous pieces of metal in the path of the bullet, nerve damage, spine damage, a split pelvis, holes through the intestines and arteries and veins and both iliac crests he was never examined or treated in the ten years from 1946 to 1956.

FIRST AUSCULTATION 10 YEARS AFTER THRU AND THRU GUNSHOT WOUND OF ABDOMEN.

In the first auscultation examination by the Veterans Administration on Feb. 14, 1956 . . . petitioner was found to have loud noises in the abdomenal area . . . X-rays were taken and numerous pieces of metal were discovered in the same area. Dr. Bettenbaugh, the V.A. examining doctor, recorded that petitioner had a traumatic arteriovenous aneurysm caused by a through and through gunshot wound. However, petitioner was never rated or compensated for a traumatic arteriovenous aneurysm . . . due to omissions in the medical record. The record did not show that petitioner had a through and through gunshot wound and of course the record did not show any internal damage. Two aortagrams were given to find location of the traumatic arteriovenous aneurysm. Both aortagrams were defective and did not show location or even the existance of aneurysm.

DEFECTIVE AORTAGRAM

Dr. Bettenbaugh recorded that the doctor who performed the aortagram "failed to inject the proper amount of dye in the aorta" and that was why "The aortagrams failed to demonstrate fistula or aneurysm." This was negligence and is covered by the Tort Claims Act. The negligence was in the failure to inject the proper amount of dye and the failure to arrange for a third aortagram to find the location of the aneurysm.

If the aortagram would have been properly performed the doctors would have known that there were two aneurysms and more important . . . WOULD HAVE KNOWN THE EXACT LOCATION OF THE ANEURYSMS. This would have avoided the damage done in the aneurysm operation of Sept. 26, 1956. (The operation report summary states "While searching for a second fistula (or aneurysm) a rent was cut in the common ilac vein, requiring ligation of all the main veins to the left leg."

Petitioner was discharged from the Sawtelle Veterans Hospital (Wadsworth) on March 19, 1956 and received no treatment until he returned to the same hospital on or about August 26, 1956. Petitioner at this time requested tests and treatment to correct internal problems. Location of aneurysms still in doubt.

RENT CUT, LIGATION OF ALL ILIAC VEINS TO LEFT LEG. IN CENTER OF BODY.

An aneurysm operation was performed on Sept. 26, 1956. After the first aneurysm was corrected between the common iliac vein and the hypogastric artery . . . a second aneurysm was discovered . . . Again, dissection was begun in this area, with considerable scarring, however, during this dissection a large venous bleeder was encountered . . . "It was eventually necessary to ligate the hypogastric vein, the external iliac vein, the common iliac vein, and one of the large gluteal branches of the iliac vein."

Petitioner came too after the operation . . . with terrible pains in the abdomenal area, tremendous swelling in the left leg, and chest pains and found it hard to breathe. Appellant, at that time was so ill and depressed that he seriously thought of throwing himself from the second story window of the hospital.

PETITIONER FILED FORM 8-526a FOR MALPRACTICE. MARCH 6, 1957.

Appellant FILED HIS FIRST ADMINISTRATIVE CLAIM WITH THE LOS ANGELES REGIONAL OFFICE ON 3/6/57. . . . IT WAS DATED ON 3/15/57 BY THE V.A. REGIONAL OFFICE AS BEING RECEIVED ON THAT DATE. IT WAS FILED ON A V.A. FORM 8-526a. THIS IS THE PROPER FORM FOR FILING A MALPRACTICE CLAIM AGAINST THE VETERANS ADMINISTRATION. IT IS A CLAIM FOR AN INJURY DURING MEDICAL OR SURGICAL TREATMENT WHILE IN A V.A. HOSPITAL. (UNDER SECTION 31, PUBLIC NO. 141, 73RD CONGRESS, SECTION 12, PUBLIC NO. 866, 76TH CONGRESS AND SECTION 2, PARAGRAPH 4, PUBLIC NO. 16, 78TH CONGRESS.)

NO FINAL DISPOSITION OF CLAIM (SEE LETTERS FROM V.A.)

Petitioner states

"This is listed as EXHIBIT "B" in Admissions. In this claim I described the damage that I knew about at that time. I listed only the cutting of a rent in the main vein and that a vein had been tied off. I listed the "thromboflabitis pain and swelling in the left leg" . . . and I asked for payment for the damage done. This claim was ignored" . . . Petitioner also requested retroactive compensation for the effects of the bullet through the body. The claim is still on appeal in Washington with the Board of Veteran Appeals. This last appeal was filed over three years ago . . . but it is still pending. The malpractice claim has never been finally determined by the Board of Veteran Appeals.

The plaintiff, appellant and petitioner filed an administartive claim on March 6, 1957, for Malpractice for the cutting of a rent and ligation of a vein. This malpractice claim was ignored. Under the rules governing the Statute of Limitations. The filing of an administrative claim, in writing, with the agency involved, within two years of the injury . . . will act as a bar to the statute of limitations until six months after final determination of the agency involved . . . in this case The Veterans Administration. Now, due to the fact that the malpractice case is still pending with the Board of Veterans Appeals, appellant has until six

months after final determination of the administrative claim . . .before the statute of limitations could apply.

PETITIONER FILED SUIT (NOV. 13, 1964)

Petitioner filed suit on November 13, 1964. Under the Tort Claims Act, 28 U.S.C. 1346(b), the filing of an administrative claim also acts as a bar to the filing of an action . . . however "If the agency fails to make a final disposition of the claim within six months after it failed, the claimant may, at his option deem such failure to be a denial of the claim" . . . he may then file suit. (28 U.S.C. 2675(a), as amended.) It is also explained that "If the agency fails to forward the claim to the proper section for payment of the claim . . . this will have no effect on the "Bar" to the statute of limitations." The claimant still has until six months after final determination of the claim . . . before the statute of limitations could apply.

DEFENDANT GRANTED SUMMARY JUDGMENT. HOWEVER ADMINISTRATIVE PORTION OF FEDERAL TORT CLAIMS ACT 28 U.S.C. 2401(b) WAS OMITTED.

The defendant and respondent requested and was granted a summary judgment that the plaintiff, appellant and petitioner was barred from recovery on the complaint by the two year statute of limitations in the Federal Tort Claims Act. Defendant and respondent

then lists 'This statute of limitations is found in 28 U.S.C. 2401(b) and reads as follows; . . . [Tr. p. 11.]

". . . .

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . . ."

The attorney for the defendant and respondent very clearly omitted the most important part of 28 U.S.C. 2401 (b) as follows:

"UNLESS IT IS PRESENTED IN WRITING TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER SUCH CLAIM ACCRUES OR UNLESS ACTION IS BEGUN WITHIN SIX MONTHS AFTER THE DATE OF MAILING, BY CERTIFIED OR REGISTERED MAIL, OF NOTICE OF FINAL DENIAL OF THE CLAIM BY THE AGENCY TO WHICH IT WAS PRESENTED. AS AMENDED SEPT. 8, 1959, PUB.L. 86-238 1(3), 73 STAT. 472; . . ."

Petitioner states . . .

"Now my original claim was filed on March 26, 1957 and this was for the rent that was cut in the main vein . . . and the tying off of the vein to the left leg. That was all I knew at that time. If the defendant and respondent feel that that was malpractice and that I should have sued the United States of America at that time . . . I was covered by the administrative claim . . . that acted as a bar to the statute of limitations until

six months after final determination of the claim. There has never been a final determination of the claim. Now, if the defendant and respondent can produce a receipt proving that final determination of the claim was sent to petitioner by certified mail or registered mail then the bar of the statute of limitations would not apply."

ADDITIONAL NEGLIGENCE DISCOVERED AFTER NOV. 27, 1962.

Petitioner states . . .

"I didn't discover the ligation of the external iliac vein, the ligation of the hypogastric vein and the ligation of the large gluteal branch of the iliac vein until the release of my medical records from Sawtelle (Wadsworth) Veterans Hospital on November 27, 1962. I didn't discover the failure of the doctor to "insert the proper amount of dye in the aorta" until my medical records were released on November 27, 1962. By this negligence the operating doctors failed to know the location of the two traumatic arteriovenous aneurysms. They didn't even know I had two aneurysms. And they failed to properly record the name *aneurysm*. Accord- to the Alphabetical Index of Disabilities of the Schedule for Rating Disabilities of the Veterans Administration . . . there is no such listing as a fistula between an artery and a vein. There is a fistula of the ano, bladder, bronchocutaneous or bronchopleural, intestine, rectovaginal or urethra . . . however, if you consult

Modern Surgery by Decosta, or any other medical book that explains the results of gunshot wounds of the abdomen you will find that a perforating rife bullet often leaves openings between the arteries and veins and the proper name for this type of damage . . . is a *traumatic arteriovenous aneurysm.* Now, look at the Alphabetical Index of the V.A. Schedule for Rating Disabilities on page 6761 under *aneurysm,* diagnostic code number 7113 is listed *Traumatic arteriovenous aneurysm,* and the minimum rating for compensation is 50% for one."

NO MENTION OF TRAUMATIC ARTERIOVENOUS ANEURYSMS.

Petitioner states . . .

"I had two traumatic ateriovenous aneurysms and there is no doubt that I had them from the date of the through and through gunshot wound . . . and the Veterans Administrations negligence in failing to examine petitioner and failure to X-ray and treat petitioner even though he had severe internal damage caused by the through and through bullet wound is also included in this action. The Government is not liable under the Tort Claims Act for negligence committed Petitioner while he was in service . . . but here we are talking about omissions of fact in the medical records . . . and lack of treatment for severe disabilities that were with the Veteran after his discharge from service. And to prove the continuing negligence even at this late date. . . .The numerous pieces of metal in the

path of the bullet through the body were not even seen or recorded in the medical file until 1963. The adjudication office did not know that I had a through and through gunshot wound until 1963 and didn't admit it until 1964. For proof of the omissions of fact please review the Rating Decision of the Los Angeles Office of the Veterans Administration . . . dated April 12, 1960."

Petitioner continues . . .

"There is no mention of through and through bullet wound. There is no mention of the ligation of the common iliac vein . . . there is no mention of the ligation of the external iliac vein . . . there is no mention of the hypogastric vein . . . there is no mention of the ligation of the large gluteal branch of the iliac vein. There is no listing or rating for Traumatic Arteriovenous Aneurysms . . . no mention of numerous pieces of metal in the path of the bullet through the body . . . no mention of the four dead toes on the right foot or spine damage. Under the rules of the Veterans Administration nothing can be rated unless it is listed . . . and every disability must show the origination of that disability. Is there any doubt that the omissions of fact in the medical records that are listed above are covered by the Tort Claims Act. Claims have been filed for all of the omissions listed and final determination has not been made."

NATHAN CARL SWARTZ AWARDED $725,000 FOR V.A. MALPRACTICE. JUNE 17, 1964.

I would like to list the results of a suit filed in the United States District Court in Pennsylvania. This was listed as *Nathan Carl Schwartz v. UNITED STATES OF AMERICA,* civ. A. No. 23802, June 17, 1964. Action was under the Federal Tort Claims Act predicated upon negligence in failure to track down veteran who had been treated with a dangerous drug during service. It was not in the injection of the dangerous drug that the Government was liable . . . but the failure to seek out those who had received it. The award was for the plaintiff in the amount of $725,000. Judge Freedman stated that "government had duty to follow up those cases in which drug had been installed even if patients never returned to a government physician." also he found that "government supervisory specialists were negligent in not tracking back from government records identity of those persons who were exposed as result of goverrnments past action." Judge Freedman said "No lower standard of medical practice was to be applied to government physicians than that prevailing in private practice in the area." and . . . "Failure or neglect to obtain complete records, especially in recalcitrant cases, was not proper and accepted medical practice in area."

Petitioners Marine Corps Record of hospitalization listed the reason for petitioners discharge from service as Gunshot Wound, left side . . . however, all members

of the rating board of the Veterans Administration are instructed to review the very first examination report when a man was wounded. Petitioner's first examination was on the U.S. Ship Samaritan, off shore at Iwo Jima, on Feb. 20, 1945. This examination report is in the petitioner's medical file . . . and it states "Thru and thru Gun Shot Wound of the abdomen" "bullet entered one side at iliac crest and exits the other.", "Abdomen tender and rigid," "vomiting." In every case, in a civilian hospital, this type of wound would require an immediate operation. In the petitioners case . . . no treatment for the thru and thru gunshot wound was given by the Navy Doctors . . . no tests were given and after 361 days of hospitalization and after discharge from service for the effects of the thru and thru gunshot wound . . . There were no examinations until 1956.

NO V.A. TESTS X-RAYS OR EXAMINATIONS FOR 10 YEARS.

NO EXAMINATIONS, X-RAYS, OR TESTS AND CERTAINLY NO OPERATIONS TO CORRECT THE INTERNAL PROBLEMS BY THE VETERANS ADMINISTRATION FOR THE NEXT TEN YEARS. This was clear cut negligence by the Veterans Administration. Every severly wounded veteran should be called in for complete examinations to determine for sure that no hidden damage exists that can cause his early death. The Veterans Ad-

ministration is under orders to follow the Schedule for Rating Disabilities . . . as contained in the Federal Register (Part II, Vol. 29, Number 101, Pages 6717-6764) if the rules were followed . . . Petitioner disability rating would have been 100% from the date of discharge from service. (Feb. 15, 1946 for the effects of the thru and thru gunshot wound of the abdomen . . . after 361 days of hospitalization.)

NO CONSIDERATION FOR RECONSTRUCTIVE SURGERY.

Petitioner also states . . .

"Now, after ten years with no treatment by the V.A., I had the aneurysm operation on Sept. 26, 1956 and we now know that I had ligation of the external iliac vein, hypogastric vein and the large gluteal branch of the iliac vein . . . in addition to ligation of the common iliac vein. I had thrombophlebitis of the left leg with large vericose veins in both legs, a pulmonary embolism with an infarction. I was discharged from the hospital one month later . . . in October of 1956 . . . however, I was kept on follow up for the next two and a half years. I was told to report back to the hospital every six months for an examination. During this time no treatment was given. No consideration on the possibility of reconstructive surgery to correct the vascular problems brought on by the Malpractice. On August 23, 1960 . . . petitioner received examination by Dr. Pava and Dr. Coons of the downtown Veterans Administra-

tion Office, 1031 South Broadway, Los Angeles, Calif. The examination report failed to state that veteran had been wounded with a thru and thru gunshot wound. The examination report failed to list the ligation of the common iliac vein . . . the external iliac vein . . . the hypogastric vein . . . or the large gluteal branch of the iliac vein. It failed to mention the numerous pieces of metal in the path of the bullet through the body. No tests were given and none of the procedure was followed as required by the Schedule for Rating Disabilities. Even the instructions on the form were ignored. It is almost impossible to read the report, however, one statement stands out . . . "IT IS THE OPINION OF THIS BOARD OF TWO . . . THAT THE OPERATION FOR A-V FISTULA WAS NON-CURATIVE AS THE THROMBOPHLEBITIS IS STILL THERE." This is signed by Dr. Pava and Dr. Coons. Now, this suit is for omissions of fact and negligent lack of treatment to the present time as well as Malpractice during the operation of September 26, 1956. Wouldn't it be reasonable to assume that if the operation of 1956 for A-V Fistula was non-curative and that the thrombophlebitis was still there . . . that an operation to correct the internal problems would be recommended by the Veterans Administration Doctors. This report was hidden by the Local V.A. Office and the Board of Veteran Appeals was not informed that the operation was "NON-CURATIVE." The Board of Veteran Appeals also was not informed that petitioner had a thru and thru gunshot wound. . . . The Board

was also . . . not informed that petitioner had ligation of the common iliac vein, the external iliac vein, the hypogastric vein and the large gluteal branch of the iliac vein. The Board was not informed that I filed a Malpractice Claim on March 6, 1957. All of these points have been brought to the attention of the Board of Veteran Appeals and the case is being reviewed at the present time in Washington, D.C. The appeal is still pending on the malpractice claim . . . and the law is very clear that the filing of an administrative claim . . . in writing . . . will act as a bar to the statute of limitations. I did not find that the operation was "Non-Curative" until 1963 and this suit was filed in 1964. As the additional acts of negligence have come to the attention of the petitioner . . . claims . . . in writing have been filed with the Veterans Administration . . . and no final determination has been made on these claims."

REASONS GIVEN FOR GRANTING CERTIORARI

Petitioner is asking the United States Supreme Court to enforce the rules of Title 28, United States Code, 2401(b).

If a claim has been presented, in writing, within two years, to the agency involved . . . then suit shall not be barred by the statute of limitations until six months after final determination of the claim sent to the claimant by registered mail or certified mail.

Petitioner has never received a final determination of his claim for Malpractice . . . and negligence . . . and omission of facts. If this decision is permitted to stand . . . then all Veterans will be forced to sue the UNITED STATES OF AMERICA for every single injury . . . instead of going through the usual procedure of filing an administration claim. You will note that under the new rules of the Tort Claims Act . . . Claimant is not permitted to sue under any conditions until final determination of the administrative claim.

There was a $2,500 limit on the original claim . . . however, because of the additional medical treatment that will be needed due to the concealment of the facts of the operation . . . The tremendous internal damage that is now just being discovered and the existance of two traumatic arteriovenous aneurysms that were overlooked has increased the claim to $100,000.

Petitioner would like to request a complete review of the entire case . . . and due to the passage of over ten years from the date of the operation without a decision on the malpractice issue . . . if it is possible . . . make a decision on the record and not only set aside the previous determination of the lower court that was made in error . . . but make an award in any amount that the court feels is just . . . for the injury caused by the operation . . . the omissions of fact in the medical record . . . and the negligent lack of treatment from the date of discharge from the Marines on Feb. 15, 1946 to the present time.

ERROR IN PLAINTIFF'S AFFIDAVIT

There was a typographical error in the Affidavit of the plaintiff and appellant. The plaintiff's statement should have read . . . "I knew a rent had been cut in the main vein of the left leg soon after the operation in 1956. (This alone was not malpractice.) (I filed the malpractice claim on March 6, 1957) Howevrr, it was only after I learned the full facts of the operation for arteriovenous aneurysms that I realized that this was without a doubt a case of negligence and malpractice on the part of the Veterans Administration Doctors."

"I did not realize I had filed a malpractice claim on a malpractice form (V.A. Form 8-526a) until I received all my papers of the case back from the Attorney in 1967 . . . and reviewed my letters sent to the Veterans Administration soon after the operation in 1956. All of these letters were claims for payment in writing to the agency involved and well within two years of the operation. Any one of these letters introduced by the defendant as *admissions* would act as a bar to the statute of limitations . . . for each one is a claim for payment for damage. The reply must identify the damage and then make payment or refuse payment . . . for the damage. In this case . . . the reply would have to say . . . "In an operation at Sawtelle (Wadsworth) Veterans Hospital, on September 26, 1956, a rent was inadvertantly cut in the common iliac vein, instead of sewing up the rent, V.A. Doctor became confused and ligated the common iliac vein, the hypogastric vein, the extern-

al iliac vein and the large gluteal branch of the iliac vein. This resulted in thrombophlebitis of the left leg and a pulmonary embolism with an infarction. There will be permanent damage to your legs, body and chest. We hereby refuse to make payment for this damage. This refusal would then have to be sent to the claimant by certified mail or registered mail. And a receipt would have to be produced at this time otherwise the administrative claim will act as a bar to the statute of limitations.

PETITIONER'S ADMINISTRATIVE CLAIM FILED ON MARCH 6, 1957 WITH THE LOS ANGELES VETERANS ADMINISTRATION REGIONAL OFFICE ON FORM 8-526a ACTS AS A BAR TO THE STATUTE OF LIMITATIONS UNDER SECTION 31, PUBLIC NO. 141, 73RD CONGRESS, SECTION 12, PUBLIC NO. 866, 76TH CONGRESS AND SECTION 2, PARAGRAPH 4, PUBLIC NO. 16, 78TH CONGRESS. THIS WAS THE PROPER FORM OF THE VETERANS ADMINISTRATION FOR FILING A CLAIM FOR PAYMENT FOR MALPRACTICE IN A V.A. HOSPITAL (This is listed as "Application for Compensation," Exhibit "B" to Request for Admission No. 2) (Tr. p. 38)

ALL LETTERS TO V.A. WERE CLAIMS FOR PAYMENT THAT WOULD BAR STATUTE OF LIMITATIONS.

The letter of March 26, 1957 that is mentioned (Tr. p. 37) four times in the decision of Irving Hill granting the Summary Judgement to defendant was written after the Malpractice Claim mentioned above was already filed. The Bar to the statute of limitations had already been established by the filing of the Administrative Claim for Malpractice on March 6, 1957.

Judge Irving Hill states in his decision (Tr. p. 37) that . . . "A tying off of the main iliac vein necessarily involves a tying off of the other veins mentioned by Plaintiff as they are subsidiary to and lower than the main vein and dependent thereon."

This is a conclusion . . . and is in error . . . The external iliac vein, the hypogastric vein and the large gluteal branch of the iliac vein were not *"necessarily"* tied off . . . They were *actually* tied off . . . and this increased the disability tremendously. The ligation of additional veins . . . undoubtedly results in additional vascular problems and increased disability. A medical determination is required here and that means we must have a trial or a decision in favor of the petitioner.

Petitioner's letter to the Veterans Administration dated June 6, 1957 (Admissions Exhibit "C" pp. 3) states . . . " The Veterans Administration owed him a settlement for the rent and the ligation. This was a

claim for payment and identifying the Malpractice. No final determination has ever been made on this claim . . . it is still pending.

EVEN REQUEST FOR SURGERY WAS IGNORED BY V.A.

Petitioner's claim for payment for the malpractice on May 19, 1960 (Exhibit "E" to Request for Admission No. 3) was filed after the March 6, 1957 claim had already barred the statute of limitations but it was an additional claim, in writing, to the agency involved, and emphasizing the point that payment must be made for the malpractice. The letter just cited also proves additional negligence. On page 2 of the letter of May 19, 1960 . . . petitioner stated . . . "Now, to the second purpose of this letter . . . My left leg is giving me a lot of trouble. As I mentioned earlier the main vein to the left leg was tied-off during the operation in 1956. It seems that the only way to stop this leg from swelling is to correct the basic problem. THIS WOULD BE BY REPLACEMENT OF THE VEIN THAT WAS TIED OFF. IF THE OPERATION WERE SUCCESSFUL . . . IT WOULD LET THE BLOOD FLOW NORMALLY . . . AND MOST OF THE SWELLING WOULD DISAPPEAR. IF NOTHING IS DONE . . . THE LEG WILL GET WORSE AS YEARS GO BY. I WOULD LIKE TO TAKE A CHANCE ON THE OPERATION.

Petitioner now states . . .

"I requested the above reconstruction surgery, in writing, to the agency involved . . . and never received a reply . . . I am still waiting for the determination on my request. This is clear cut negligence. Almost seven years have passed and no decision has been made on Petitioner's request for consideration of reconstructive surgery."

Under Conclusions of Law (Tr. p. 38) the two-year statute of limitations under Federal Tort Claims Act (28 U.S.C., Section 2401(b) is barred if an Administrative Claim is filed (1) in writing, (2) to the agency involved and (3) within two years of the injury . . . or discovery of the injury that constitutes malpractice. As stated before . . . petitioner's administrative claim for malpractice on V.A. form 8-526a (V.A. official form for Malpractice in a V.A. hospital) was filed on March 6, 1957. It was filed with the V.A. Regional Office in Los Angeles and well within the two year limit.

IS "LACK OF TREATMENT" AND "OMISSIONS OF FACT" INCLUDED IN SUIT?

HUNGERFORD v. UNITED STATES.
Cite as 307 F. 2d 99 (1962)

STATUTE OF LIMITATIONS DID NOT APPLY BECAUSE OF DEFECTIVE DIAGNOSIS AND LACK OF PROPER TREATMENT . . . SUMMARY JUDGMENT WAS REVERSED BY THE COURT OF APPEALS, HAMLEY, CIRCUIT JUDGE. UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

Attorney for defendant and respondent cited this case several times . . . (Tr. p. 11, p. 12 and p. 13) . . . to prove that defendant and respondent was entitled to summary judgment by applying the statute of limitations. However, he failed to mention that the summary judgment granted the United States of America was reversed on appeal for the very same reasons charged by plaintiff, appellant and petitioner in this case, *Dulaine v. United States of America,* and the cause remanded for further proceedings. It is a well established rule to grant a writ of certiorari if appellate decision in the petitioner's case is in conflict with an earlier decision by the same court of appeals. (Petitioner filed suit for defective aortagram, failure to diagnose two traumatic arteriovenous aneurysms before operating on petitioner, failure to perform reconstructive surgery, ligation of common iliac vein,

external iliac vein, hypogastric vein and large gluteal branch of iliac vein . . . as well as negligent lack of treatment to the present time. All this was in addition to the cutting of a rent in the common iliac vein. It is clearly stated in the opinion by Judge Hamley . . . "Here, under the allegations of the complaint, the government had not only the duty to communicate to Hungerford a correct diagnosis of his condition, but also to render proper care for the treatment of the physical condition from which he was actually suffering." Petitioner made exactly the same charge in his complaint. (Tr. p. 10, p. 15, p. 16, p. 17, p. 20, p. 26, p. 27, p. 28, p. 29, p. 30, p. 31, p. 32, p. 33, p. 34. etc.)

WHEN DID CLAIM ACCRUE?

As stated by the attorney for the defendant and respondent . . . Federal Law governs in determining whether claim has accrued within Federal Tort Claims Act for purpose of limitations. 28 U.S.C.A. 1346(b), 2401(b), 2674.

IN 1964 TRAUMATIC ARTERIOVENOUS ANEURYISM FIRST ADMITTED.

There is no doubt that some or all of the injury for which petitioner seeks damages did not occur until after he was released from the Veterans Administration Hospital. In fact, petitioner received Statement of the Case from Los Angeles Regional Office on Sept. 29, 1964 which grants increased compensation award for traumatic arteriovenuous aneurysm back to 1962. Under "Reasons for Decision" it explains "Dulaine had no major vascular problems previous to 1962." (Petitioner actually had two traumatic arteriovenous aneurysms, thrombophlebitis of the left leg with large vericose veins up to 2½ cms in size, ligation of the common iliac vein, external iliac vein, hypogastric vein and the large gluteal branch of the iliac vein, also the hypogastric artery was ligated. Petitioner also had a pulmonary embolism and infarction in addition to the effects of the original thru and thru bullet wound of the abdomen with numerous small pieces of metal in the path of the bullet . . . with bone damage to the left iliac crest, spine damage and a split pelvis . . . all of this proving tremendous damage to the vascular system.) However, if it is not recorded and no treatment is given then it is grounds for a suit . . . and that is part of this action.

DOES EXCLUSION APPLY? CLAIMS EXCLUDED BY SECTION 2680(h) DOES NOT APPLY.

It is settled that exclusion by Section 2680(h) has no application to claims by veterans who, although their original injury or disability was incurred during the course of combat, are seeking damages for alleged medical malprctice during subsequent treatment in a government hospital. (*Hungerford v. United States,* 192 F. Supp. 581, 584 (ND Cal. 1961) rev'd on other grounds 307 F. 2d 99 (9th Cir. 1962).

The Administrative Claim that was filed on March 6, 1957 acted as a bar to the Statute of Limitations and therefore the Summary Judgment that was granted to defendant was awarded in error.

It is respectfully requested that the United States Supreme Court grant this request for WRIT OF CERTIORARI to review the above case in its entirety . . . to prevent a gross miscarriage of justice.

ROBERT DULAINE,
Petitioner.

APPENDIX "A"

TORT CLAIMS ACT
ADMINISTRATIVE CLAIMS
STATUTE OF LIMITATIONS

280.04 Written Claim.

The provisions of Section 2401(b), both before and under the 1966 amendment, require the administrative claim to be presented in writing. A telephone call to the agency involved, advising of the accident and of the claimant's damage or injury will not suffice. Nor will a personal visit for a discussion of a claim with representatives of the agency meet the section's requirement. The claim must be in writing; an oral submission is not effective. IT IS POSSIBLE THAT A LETTER GIVING THE ESSENTIALS OF THE CLAIM OR EVEN THE SUBMISSION OF ESTIMATES OF REPAIRS, MAY BE SUFFICIENT. (See *Patitucci v. United States,* 178 F. Supp. 507, 508 ED Pa 1959), raising but not deciding the question.)

280.01 Judge Biggs, of the Third Circuit, has said 7 that the requirement of filing a claim under Section 2401(b) "makes the operation of the limitations statute unlike the usual statute of

limitations. It is not the mere passage of time which bars relief, but passage of time without the filing of a claim. Accordingly, the Government must demonstrate that no claim was filed'' when, by motion for summary judgment, it seeks to controvert an allegation of the complaint that an administrative claim was filed within the Act's two-year period. 8

7 *Patitucci v. United States,* 178 F Supp 507, 509 n. 6 (Ed Pa 1959) (Judge Biggs was sitting by special designation).

8 Compare *Henson v. United States,* 88 F Supp 148 (Ed Mo 1949), discussed in n. 11, *infra.*

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

ROBERT DULAINE, Plaintiff,	)	Civil
vs.	)	Action
THE UNITED STATES OF AMERICA,	)	No.
Defendant.	)	64-1565-IH

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDAT'S MOTION FOR SUMMARY JUDGMENT.

[Filed Aug. 24, 1965, U.S. District Court, Southern District of California, Wm. A. White, Deputy.]

The Motion of Defendant, United States of America, for Summary Judgment, came on regularly for hearing before the Honorable Irving Hill, Judge, on Monday, August 23, 1965, at 10:00 A.M. and was submitted without argument, and the Court having considered the Affidavits of the parties and the Answers to Interrogatories and Requests for Admissions of Fact, and it appearing to the Court that there is no genuine issue as to any material fact concerning the defense of the statute of limitations, and that Defendant is entitled to findings and judgment in its favor as a matter of law, the Court hereby makes the fol-

lowing findings of fact and states the following conclusions of law:

Findings of Fact

1. The Court has jurisdiction of the matter under Title 28 U.S.C. Section 1346(b).

2. The action is one for medical malpractice. The gravamen of the complaint is that an operation performed on the Plaintiff at a Veteran's Administration Hospital at Sawtelle, California, in September, 1956, was negligently performed resulting in personal injury to the Plaintiff.

3. The particular acts of negligence upon which the complaint is based is set forth in Plaintiff's Answer to Defendant's Interrogatory No. 2. Plaintiff charges that the negligence consisted of (a) improper technique in performing an aortogram (a pre-operative precedure) resulting in the failure to diagnose a second aneurysm or fistula (one having admittedly been diagnosed), (b) the cutting of a rent in the common iliac vein and ligation of the common iliac vein, the hypogastric vein, the external iliac vein, and one of the large gluteal branches of the iliac vein, and (c) injury to the throat during surgery affecting voice and speech. All of said negligent acts occurred at or before the operation was performed in September 1956.

4. Within a year after said operation of September, 1956, Plaintiff was aware of each and every ad-

verse effect alleged to be a result thereof and every act of alleged negligence, with the possible exception of the throat problems. By March 26, 1957, Plaintiff was aware that the aortogram had failed to disclose two fistulas (see Plaintiff's letter of March 26, 1957, Exhibit "A" to Request for Admission No. 1). By March 26, 1957, Plaintff was aware that the main vein to the left leg had been cut and tied off (see Plaintiff's letter, Exhibit "A"; cited supra). A tying off of the main iliac vein necessarily involves a tying off of the other veins mentioned by Plaintiff as they are subsidiary to and lower than the main vein and dependent thereon (see *Dorland's Illustrated Medical Dictionary,* 23rd Edition, Plate XLIX). By March 26, 1957, Plaintiff was aware that only one fistula had been discovered and diagnosed (see Plaintiff's letter, Exhibit "A"; cited supra). Plaintiff was aware of the adverse effect of said cutting and tying off in the spring of 1957 (see "Application for Compensation," Exhibit "B" to Request for Admission No. 2). At least by March 14, 1960, Plaintiff was aware of the alleged injury to the throat (see letter dated March 14, 1960, Exhibit "D" to Request for Admission No. 4). By May 19, 1960, Plaintiff had reached the firm conclusion that malpractice had taken place in connection with the said operation of September, 1956(see letter of May 19, 1960, Exhibit "E" to Request for Admission No. 5).

5. On February 2, 1959, Plaintiff was discharged as a patient from the Veteran's Administration Hospital at Sawtelle, California.

6. The complaint herein was not filed until November 13, 1964.

Conclusions of Law

As conclusions of law, based on the foregoing findings of fact, the Court concludes as follows:

1. The two-year statute of limitations under the Federal Tort Claims Act (28 U.S.C., Section 2401(b)) begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice.

Quinton vs. United States, 304 Fed. 2d 334 (5th Cir. 1962)

Hungerford vs. United States, 307 Fed. 2d 99 (9th Cir. 1962).

2. Plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice in this case on or before May 19, 1960.

3. Plaintiff's claim is therefore barred by the aforesaid statute of limitations, and Defendant is entitled to a summary judgment that Plaintiff recover nothing from Defendant.

DATED: August 24, 1965.

IRVING HILL

Irving Hill, Judge
United States District Court

(Administrative Decision has not been made . . . By Board of Veterans Appeals, Washington, D.C.). (See Appendix D).

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT DULAINE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 20,551

[January 12, 1967]

Appeal from the United States District Court
for the Southern District of California
Central Division

Before: BARNES and ELY, Circuit Judges; and PECKHAM, District Judge

PER CURIAM:

This is an appeal from an order granting the defendant's motion for summary judgment. The court below had jurisdiction of the suit under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Our jurisdiction is under 28 U.S.C. § 1291.

The appellant, plaintiff below, was injured at Iwo Jima during World War II. Until 1959 he was being

treated by the Veterans Administration. In 1956 he was operated upon. He contends that the doctors and/or staff of the Veterans Hospital were negligent in treating him on or before the date of his operation.

The plaintiff filed his complaint in this suit on November 13, 1964. The defendant United States filed a motion for summary judgment on the ground that the suit was barred by the two-year statute of limitations on Federal Tort Claims Act actions, 28 U.S.C. § 2301(b). The motion was granted, and the plaintiff has appealed.

Under Rule 56(c) of the Federal Rules of Civil Procedure summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since the basis of the government's motion for summary judgment was that the appellant's claim was barred by the statute of limitations, the question of when the claim accrued became the only material question of fact for the determination of the motion. There is no dispute that the claim accrued when the claimant knew or in the exercise of reasonable diligence should have known of the acts constituting the alleged malpractice. *Hungerford v. United States,* 307 F. 2d 99 (9th Cir. 1962).

In support of its motion the government relied on letters sent to the Veterans Administration by the ap-

pellant, who admitted sending them. These letters showed that at least as early as 1960 the appellant knew that the 1956 operation was allegedly negligently done. (Supplemental Transcript, pp. 69, 72.) In opposition to the motion for summary judgment appellant submitted an affidavit which he now contends raised a genuine issue of material fact. We disagree.

Appellant's affidavit is directed to his conclusion as to when he learned the "true facts" (Tr. p. 25), and the fact that his letters never made a formal claim for malpractice (Tr. p. 30). This does not controvert the fact that earlier he was aware of facts which would have led a reasonable man to believe, and, indeed, did lead him to believe, that he had been negligently treated. A 1960 postscript included the appellant's statement, "If this would have happened in a private hospital . . . I am sure it would have resulted in a civil suit for mal-practice and a settlement for many thousand of dollars." (Supplemental Transcript, p. 68.)

No genuine issue of material fact was raised by appellant's affidavit, and summary judgment was properly granted.

AFFIRMED.

APPENDIX "D"

THE CASE IS STILL PENDING WITH THE BOARD OF VETERANS APPEALS WASHINGTON, D.C.

The following excerpts are from letters contained in this petition and listed Appendix "D." The excerpts are from letters from the Veterans Administration offices in Washington and Los Angeles. They prove the FINAL DETERMINATION has not been made.

1. Application for Compensation (Original Malpractice Claim) (Listed under "Admissions" in Lower Court . . . "Exhibit "B") This was copy of original application for payment for injury in Veterans Administration Hospital during surgery on Sept. 26, 1956. It was filed on March 6, 1957, in writing and with the agency involved. It described the damage done, the results of the damage and requests payment under SECTION 31, PUBLIC NO. 141, 73RD CONGRESS, SECTION 12, PUBLIC NO. 866, 76TH CONGRESS AND SECTION 2, PARAGRAPH 4, PUBLIC NO. 16, 78TH CONGRESS. (This claim has been ignored by the V.A.)
2. Application for Compensation (Second Official Malpractice Claim) This was filed on 11/22/63 soon after I learned the additional facts of the ligation of the external iliac vein, the hypogas-

tric vein and the large gluteal branch of the iliac vein and of the concealment in the case. This was when I learned the true facts of the Malpractice.

3. Letter from Board of Veterans Appeals, Washington, D.C. . . . it states . . . "I am having your records recalled from the Los Angeles Office." . . . It is signed "James W. Stancil, Chairman." It refers to review of the appellate decision of March 1961. This includes the concealment of the Malpractice by the V.A. Doctors. This letter is dated Nov. 7, 1963.

4. Letter from Board of Veterans Appeals, Washington, D.C. . . . it states . . . "You will be informed when a final decision has been reached." It is also signed by Mr. Stancil and dated Feb. 27, 1964.

5. Letter from Veterans Administration, Los Angeles Regional Office . . . It states . . . "Your appeal and the records in the case are being forwarded to the Board of Veteran Appeals, Washington, D.C., *for disposition.*" . . . it is signed . . . "F. B. Williams, Adjudication Officer." . . . It is dated . . . "Dec. 17, 1964."

6. Letter from Board of Veterans Appeals, Washington, D.C. . . . it states . . . "In January, 1965, *your records were returned to the Los Angeles Regional Office* since they were needed in a *malpractice suit* against the Veterans Administration." . . . It is signed . . . "James W. Stancil, Chairman." The date at the top of the letter is "August 19, 1965."

7. Letter from Veterans Administration, Department of Veterans Benefits, Washington, D.C. . . . It states . . . *"We find that your appeal to the Administrator of Veterans Affairs is pending* before the Board of Veterans Appeals. We are returning your records to Los Angeles so that they can complete their action and see that your claim is ready for review by the Board of Veterans Appeals." . . .It is signed . . . "J. C. Peckarsky, Director, Compensation, Pension and Education Service."

8. Letter from Board of Veterans Appeals, Washington, D.C. . . . It states . . . "Your correspondence relataing to the *appeal you have pending* has been noted." . . . it is signed . . . "James W. Stancil, Chairman" . . . and dated "June 28, 1966."

9. Letter from Veterans Administration, Los Angeles Regional Office . . . It states . . . *"Your appeal with the Veterans Administration is still pending.* When the litigation is disposed of your records will be returned to the Board of Veterans Appeals, Washington, D.C. for appellate review." . . . It is signed . . . "H. M. Webster, Manager."